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IN THE Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS MCI CARRIERS AND N-TRIPLE-C INC. IN OPPOSITION

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No. 74–1550

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
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FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS MCI CARRIERS AND N-TRIPLE-C INC. IN OPPOSITION

Respondents MCI Carriers[1] and N-Triple-C Inc.[2] (hereinafter sometimes referred to collectively as MCI),

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[1]The MCI Carriers are Microwave Communications, Inc. and MCI Telecommunications Corporation. The following companies, initially listed among the MCI Carriers in the proceeding before the court below, were subsequently merged into MCI Telecommunications Corporation: MCI New England, Inc., MCI Pacific Coast, Inc.,

respectfully submit their brief in opposition to the petition of the National Association of Regulatory Utility Commissioners (NARUC) for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The January 20, 1975 opinion of the court of appeals (Pet. App. 1a-46a) is reported as *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1975). Rehearing of the matter was denied on March 12, 1975 (Pet. App. 47a). The decision of the Federal Communications Commission (FCC or the Commission) under review (Pet. App. 48a-188a) is reported as *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules*, 29 FCC 2d 870 (1971) (*Specialized Carrier* decision). The Commission's order denying reconsideration (Pet. App. 189a-194a) is reported at 31 FCC 2d 1106 (1971).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on January 20, 1975. A petition for rehearing was

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MCI-North Central States, Inc., MCI Mid-Continent Communications, Inc., MCI Texas-Pacific, Inc., MCI St. Louis-Texas, Inc., MCI Michigan, Inc., MCI Pacific-Mountain States, Inc., MCI Southeast Communications, Inc., MCI Texas East Microwave, Inc., MCI Kentucky Central, Inc., MCI Indiana-Ohio, Inc., MCI Mid-Atlantic Communications, Inc., MCI Mid-South, Inc., Interdata Communications, Inc. and MCI-New York West, Inc.

[2]Formerly Nebraska Consolidated Communications Corp.

denied on March 12, 1975 (Pet. App. 47a). The petition for a writ of certiorari was filed on June 9, 1975. By order dated June 20, 1975, the Clerk of the Court granted an extension of time to July 29, 1975 within which to file briefs to all non-Federal respondents. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's authority to permit entry into the business and data communications market by way of a rulemaking proceeding was curtailed by this Court's subsequent decision in *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), which dealt with the indirect regulation of the rates of small natural gas producers.

2. Whether the Commission's decision favoring entry of new specialized carriers should be reversed by this Court on the ground that the FCC subsequently instituted a fact-finding inquiry into the economic implications of interrelationships of a wide variety of common carrier regulatory practices.

3. Whether the FCC's policy favoring entry of specialized carriers should be reversed because the Commission did not issue an environmental impact statement in a proceeding where no one had even suggested the existence of an environmental question and where the facilities involved have already been constructed.

STATEMENT OF THE CASE

Background

For the past sixteen years the FCC has authorized the use of private microwave systems by businesses and other entities to satisfy their own communications requirements. *In the Matter of Allocation of Frequencies in the Bands Above*

890 Mc., 27 FCC 359 (1959), 29 FCC 825 (1960). In its *Above 890 Mc.* decision, *supra*, the Commission rejected claims by the established carriers that the licensing of private users would financially burden such carriers and their other customers. 27 FCC at 387-390, 411; 29 FCC at 849-852.

In 1963, when Microwave Communications, Inc. (Microwave) filed applications with the FCC to construct a specialized communications common carrier system between St. Louis and Chicago, it was essentially proposing to make available, to users too small to construct their own private microwave systems, the advantages of microwave technology in forms designed to meet their specialized needs. In 1969, after a full evidentiary hearing, the FCC granted the required authorizations to Microwave upon a finding that competition was reasonably feasible and could be expected to provide some public benefits. *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), *reconsideration denied*, 21 FCC 2d 190 (1970). AT&T and Western Union initially appealed the decision, but then moved to dismiss their own appeals. *AT&T v. FCC*, Nos. 23,959, 23,960, 71-1130, 71-1131 (D.C. Cir., dismissed 1971).

Proceedings Before the FCC Below:

The grant to Microwave Communications, Inc. resulted in the filing of a large number of applications for authority to provide a variety of interstate specialized communications services. Rather than initiating separate proceedings as to each of the applicants, the Commission decided to conduct a general rulemaking proceeding to resolve the common policy issues presented by their applications. *Specialized Common Carrier Services* (Docket No. 18920), 24 FCC 2d 318 (1970). The Commission stated the issues to be addressed as follows (24 FCC 2d at 327):

A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and, if so,

B. Whether comparative hearings on the various claims of economic mutual exclusivity among the applicants are necessary or desirable in the circumstances;

C. What standards, procedures and/or rules should be adopted with respect to such technical matters as the avoidance of interference to domestic communications satellites in the 6 GHz band, the avoidance or resolution of terrestrial frequency conflicts and route blockages both vis-a-vis the facilities of established carriers and among the applicants, and the use of frequency diversity;

D. Whether some measure of protection to the applicants' subscribers is called for in the area of quality and reliability of service; and

E. What is the appropriate means for local distribution of the proposed services?

The Commission's order instituting the proceeding provided that, once these broad policy questions had been answered, it would "consider each proposal on its individual merits and follow such procedures as may be necessary to resolve any remaining questions pertinent to the particular set of applications." 24 FCC 2d at 327. The FCC also invited the parties to suggest additional questions for consideration in the rulemaking proceeding. 24 FCC 2d at 349.

In the extensive proceeding that followed, voluminous comments were filed by the specialized common carrier applicants, AT&T and its operating companies, independent telephone companies, other carriers, scores of businesses and business associations, and other interested parties, including the petitioner here. All of the parties were also given an

opportunity to present their views and arguments at a lengthy oral argument before the Commission *en banc*.

With respect to Issue A, the FCC concluded as follows (Pet. App. 147a-148a):

> We find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

As to Issue B, the Commission concluded "that it is not necessary or desirable in the public interest to hold comparative hearings for the purpose of restricting new entry in any particular area to only one private line applicant" (Pet. App. 159a). With respect to Issue C, the Commission adopted various technical changes in Part 21 of its Rules (47 CFR Part 21) to improve spectrum utilization. The Commission deferred final action on Issues D and E, although it reaffirmed the view, expressed in the Notice originating the procedure, that the established carriers should provide interconnections to the specialized carriers on a reasonable and nondiscriminatory basis.

After issuance of the Commission's *Specialized Carrier* decision, the National Association of Regulatory Utility Commissioners (NARUC) and the Washington Utilities and Transportation Commission (WUTC) filed petitions for reconsideration of the decision with respect to Issues A and

B. NARUC argued that competition would divert revenues from the existing carriers and cause higher intrastate rates. The Commission denied reconsideration, concluding that (Pet. App. 191a-192a):

> . . . NARUC offers no factual or other record support for these bold assumptions. Nor does the NARUC challenge any of the detailed findings made by the Commission on the basis of the extensive record herein that such new entry will have no significant adverse impact on the rates or revenue requirements applicable to the essential services of the existing carriers. Specifically, the Commission found that there is substantial evidence of a rapidly growing market for new and diversified communication services to meet the changing and expanding communications requirements of the public; and that the public interest in efficient and economical communications would best be served by authorizing additional carriers to compete with the existing carriers in serving that market. In reaching this conclusion, the Commission considered the technical and other limitations presently existing in the plant, operations and other capabilities of the existing carriers. The Commission also concluded that any potential adverse effects of such new entry on the existing carriers and their customers would be minimal, if any at all. In this connection, the Commission found that the revenues of the Bell System from the specialized communications services constituted a relatively small percentage of the total communications market now being served or expected to be served by the Bell System; that the Bell System is likely to obtain a very substantial share of the new market; and that any adverse effects on Western Union are not expected to be of sufficient magnitude to justify depriving the public of the benefits that the Commission warrants may

reasonably be anticipated by permitting new entry into the specialized communications field.

The Court's Decision

The U.S. Court of Appeals for the Ninth Circuit, without dissent, affirmed the Commission's decision in all respects. *Washington Utilities & Transportation Commission v. FCC* (Pet. App. 1a).

Related Proceedings Subsequent to FCC Decision

After its *Specialized Carrier* decision, the Commission undertook detailed review of the 1877 then pending individual specialized carrier applications. This took a substantial period of time. A significant number of applications had to be withdrawn, while virtually all the applications required amendment. Only 13 applications had actually been granted by the end of 1971. Another 126 were granted during the first half of 1972 and another 424 during the second half of 1972. In the years since, the Commission has acted upon nearly all of the applications which were actively prosecuted. Extensive construction has taken place and operations have commenced. MCI, for example, now operates a transcontinental system providing business and data services to such cities as Washington, Baltimore, Philadelphia, Wilmington, New York, Newark, Pittsburgh, Toledo, Akron, Cleveland, Detroit, South Bend, Chicago, Des Moines, Davenport, Kansas City, Iowa City, Lincoln, Minneapolis, Cedar Rapids, Omaha, St. Louis, Oklahoma City, Tulsa, Dallas, Austin, Houston, Tucson, Phoenix, Los Angeles, San Diego and San Francisco.

On October 4, 1973, AT&T attempted to delay competition by filing a Petition in which it requested that the Commission defer, during the pendency of a newly requested hearing, the granting of any further specialized carrier applications. The Commission denied AT&T's moratorium

petition on December 12, 1973. *Commission Policies Governing the Licensing and Regulation of Specialized Common Carriers*, 44 FCC 2d 467. The Commission observed that "AT&T's petition is in effect a request that the Commission reconsider and reverse its decision in Docket 18920" (the *Specialized Carrier* proceeding) and concluded that, 44 FCC 2d at 471:

> The facts as we know them, including the showing made by AT&T in its petition, do not support the contention that there have been such changes in circumstances and unanticipated developments which have occurred since our decision to require such reexamination. Nor does AT&T advance any significant arguments that were not carefully and extensively considered on the basis of the record in Docket No. 18920.

The Commission denied AT&T's petition for reconsideration of this order on November 13, 1974. 50 FCC 2d 416.

The Commission has, instead, extended the scope of competition in the provision of domestic specialized communications services by authorizing the use of communications satellites. *Establishment of Domestic Communications Satellites by Non-Governmental Entities*, 35 FCC 2d 844 (1972), *aff'd sub nom. Network Project v. FCC*, 511 F.2d 786 (D.C. Cir. 1975).

Another reaffirmation of the Commission's *Specialized Carrier* policy took place when the Bell System Companies attempted to deny certain types of interconnections to MCI. In *Bell System Tariff Offerings*, 46 FCC 2d 413 (1974), the Commission issued a cease and desist order requiring Bell to provide interconnection facilities on a nondiscriminatory basis to MCI and other specialized carriers for the provision of all their authorized services. In *Bell Telephone Co. v. FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3660

(U.S., June 16, 1975), the court upheld the Commission's ruling. The court found that the "full competition" mandate of the *Specialized Carrier* decision indicated that "the Commission intended to authorize the new carriers to provide all elements of private line services theretofore furnished by the established carriers." 503 F.2d at 1261-62. Since the court recognized the interconnection enforcement order as a reaffirmation and outgrowth of the *Specialized Carrier* decision, it necessarily and properly passed upon the merits of that decision, not only with respect to the basic policy in favor of full competition in the specialized communications field (503 F.2d at 1259-63), but also with respect to the Commission's discretion to proceed by rulemaking rather than adjudication (*id.* at 1263-68), and the appropriate weight to be given to competitive considerations in authorizing new entry in compliance with the principles of *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953) (*id.* at 1270-73). The Third Circuit thus, in effect, approved many of the rulings the Commission made in the *Specialized Carrier* decision, and which are under review here. This Court denied certiorari in the matter on June 16, 1975. 43 U.S.L.W. 3660.

Far less directly related to the Commission's *Specialized Carrier* decision is another subsequent proceeding discussed in NARUC's petition, Docket No. 20003. This proceeding is a fact finding inquiry entitled *Economic Implications of Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures*, 46 FCC 2d 214 (1974). As this title suggests, the inquiry is directed to studying the economic interrelations of a wide assortment of regulatory practices. In its Notice of Inquiry, the Commission was careful "to make clear that this is primarily a fact-finding inquiry and that we are not proposing in this particular proceeding to adopt any rules or policies, as such." 46 FCC 2d at 214-15; *see* 49 FCC 2d 1238-39 (1974).

ARGUMENT

I. The Decision Below Is Not In Conflict With This Court's Ruling In *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974).

NARUC is in error in asserting that there is a conflict between the FCC's decision below and this Court's ruling in *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974). The *Texaco* case has little, if any, relevance to the instant case. In the *Texaco* case, this Court dealt not with the question of market entry, which was addressed in the FCC's decision below, but rather with the question of regulating the rates of organizations that had already been permitted to compete in the regulated industry. The FCC decision, on the contrary, had nothing to do with regulation of rates. The question of market entry, which is the one that is relevant here, was addressed by this Court last year in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974). In that case the Court reached a result in favor of market entry which is similar to the one reached by the Ninth Circuit here. This Court stated, in *Bowman*, that an agency "could conclude that the benefits of competitive service to consumers might outweigh the discomforts existing certificated carriers *could* feel as a result of new entry." 419 U.S. at 298 (emphasis added).

It should be noted that, in *Texaco*, the Court proceeded on the basis that rate regulation was required by Congress because of "anticompetitive conditions in the industry." 417 U.S. at 399. In the present case, it is NARUC that wishes to impose, by administrative decree, the ultimate anticompetitive condition possible in an industry—administrative proscription of any new market entry.

NARUC asserts (pp. 17-18) that the FCC violated some "congressional assumptions embedded into the framework of regulation established by the Act," but never says just what "assumptions" it is referring to, or does not provide any basis

at all for its claim that such "assumptions" are embedded in the Communications Act. Quite to the contrary, the court below concluded that (Pet. App. 25a):

> The Supreme Court's disposition of *RCA Communications* is flatly inconsistent with NARUC's contention that new entry is impermissible if it will result in duplication of facilities of existing carriers capable of furnishing the service.

NARUC says nothing in its Petition for Writ of Certiorari which detracts in any way from the soundness of this conclusion—which holds that there are no "assumptions" in the Communications Act which foreclose competition. That holding is wholly consistent with this Court's decision in the *Bowman* case, *supra*, and also with the decision in *Bell Telephone Co. v. FCC, supra*.[3]

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[3]At page 18 of its petition, NARUC suddenly shifts from a discussion of the FCC's authorization of additional entry into the market (Issue A below) to a quotation (at Pet. App. 159a-160a) from the FCC's treatment of Issue B below, which involved the wholly separate question: "Whether comparative hearings on the various claims of economic exclusivity among the applicants are necessary or desirable in the circumstances." NARUC objects to the Commission's statement that, if the various applicants are found to be qualified and obtain the necessary resources, it deemed "the marketplace to be a more reliable and effective instrument than the comparative hearing process for determining how many and which new entrants may succeed." It is significant that none of the applicants involved, nor any of the previously established carriers for that matter, contested the Commission's decision not to conduct comparative hearings on claims of economic exclusivity among the applicants. NARUC does not advance any specific reasons here why the Commission should have reached a contrary result. The Ninth Circuit summarized the complete list of reasons the Commission gave for not holding comparative hearings in footnote 33 of its decision (Pet. App. 38a-39a) and concluded that they

NARUC also attempts—by going outside the record—to downgrade the Commission's processing of specialized common carrier applications in the wake of the 1970 *Specialized Carrier* decision as merely "ministerial" (Footnote 23, pp. 18-19). This is not factually correct. As mentioned above, the Commission took several years after its *Specialized Carrier* decision to process these applications. In each case the FCC made certain that the applicant had complied with the detailed provisions of Part 21 of the Commission's Rules (47 CFR Part 21) and had established its legal, financial and technical qualifications to operate the proposed facilities. This scarcely represented the abandonment of regulation which NARUC suggests in its instant petition.

II. There Is No Need To Decide Whether A Reviewing Court Should Consider Subsequent Inconsistent Agency Action Because The FCC Has Not Acted Inconsistently.

As a second reason for granting the writ, NARUC asks whether "a reviewing court must blind itself to subsequent agency action that is fundamentally inconsistent with its posture before the court in the decision under review" (Petition, p. 19). That question, however, is simply not relevant to this case. In point of fact, there has been no subsequent agency action that is inconsistent with the *Specialized Carrier* decision.

"reflect a careful consideration of the relevant factors and a reasoned exercise of the Commission's discretion" (Pet. App. 38a-39a). NARUC has advanced no reason to overturn this conclusion of the Ninth Circuit. It apparently quotes the passage set forth at page 18 of its brief simply because it praises the marketplace as a substitute for regulation of the number of new entrants to be admitted into the communications field, while this Court, in the *Texaco* case, said that the marketplace was not the final measure of the reasonableness of rates, and that the FPC could not wholly abandon the regulation of such rates. In short, NARUC quotes the FCC out of context—and then tries to compare apples and oranges.

The FCC has implemented its *Specialized Carrier* decision by granting numerous individual specialized common carrier applications. It has extended the reach of its policy of encouraging new competitive entry into the field of specialized communications by authorizing the use of communications satellites by new entrants.[4] It has *twice* rejected attempts by AT&T to impose a moratorium upon the grant of additional specialized carrier applications.[5] It has emphatically blocked the attempt by AT&T to undermine the *Specialized Carrier* policy by refusing interconnections required by the new carriers to provide their authorized services.[6] All of these actions are fully consistent with, and in pursuance of, the Commission's *Specialized Carrier* decision.

NARUC bases its claim that the FCC has acted inconsistently upon the agency's institution of a fact finding inquiry in Docket No. 20003, *Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures,* 46 FCC 2d 214 (1974). The relative importance of the implications of specialized carrier competition to the inquiry, it will be noted, was so small that it was not even mentioned in the rather lengthy title given the inquiry. The Commission has made it abundantly clear that Docket No. 20003 is simply a fact finding inquiry and that it therefore does not envision the adoption of any rules or

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[4] *Establishment of Domestic Communications Satellites by Non-Governmental Entities,* 35 FCC 2d 844 (1972), *aff'd sub nom. Network Project v. FCC,* 511 F.2d 786 (D.C. Cir. 1975).

[5] *Commission Policies Governing the Licensing and Regulation of Specialized Common Carriers,* 44 FCC 2d 467 (1973), *reconsideration denied,* 50 FCC 2d 416 (1974).

[6] *Bell System Tariff Offerings,* 46 FCC 2d 413, *aff'd, Bell Telephone Co. v. FCC,* 503 F.2d 1250 (3d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3660 (U.S., June 16, 1975).

policies as a result of the proceeding. *Economic Implications,* 46 FCC 2d 214 (1974), 49 FCC 2d 1238 (1974). The inquiry addresses a wide assortment of regulatory policies and practices spanning the entire field of common carrier communications–including the question whether the state regulatory commissions which make up NARUC should have required the telephone industry to charge for local exchange service on the basis of usage of the exchange plant, rather than on a flat rate basis. The fact that the Commission wishes to obtain economic data concerning these matters does not imply any prejudgment as to the soundness or unsoundness of the policies and practices in question. It is simply an example of the Commission's general surveillance of the industry and reflects its efforts to review periodically the results of its policies and the industry's practices.

While the scope of Docket No. 20003 touches upon almost every facet of the common carrier industry (*see* First Supplemental Notice, released December 17, 1974, 50 FCC 2d 574), there is not even a suggestion that the Commission is contemplating abandonment of its policy in favor of competition in the specialized communications field or questions its specific finding in the *Specialized Carrier* decision that new entry in that field will have little, if any, adverse economic impact on telephone users. (*See* Pet. App. 130a-138a, 142a-148a). Thus, there is no basis for NARUC's claim that the Docket No. 20003 inquiry and the *Specialized Carrier* decision are "fundamentally inconsistent."

If, however, it is assumed, for the sake of argument, that the institution of Docket No. 20003 in any manner implies that the Commission is reconsidering some part of the basis of its *Specialized Carrier* decision, then the Court has additional reason to deny the writ, since such reconsideration by the agency would render unnecessary the Court's review of the *Specialized Carrier* decision.

It is well settled that: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery*, 318 U.S. 80, 87 (1943). The Ninth Circuit has reviewed the grounds upon which the Commission's disposition was made and found those grounds reasonable (Pet. App. 27a). NARUC's attempt, past the eleventh hour, to introduce extraneous and suppositious matter not before the agency when it acted should not be permitted to forestall the prompt and orderly termination of these proceedings.

III. The Fact That The FCC Did Not Issue An Environmental Impact Statement In Its Rule Making Does Not Require Review Of Its Decision.

The proceeding below was a rulemaking proceeding to resolve certain carefully delineated policy issues common to a large number of individual specialized common carrier applications. The Commission gave all interested parties the opportunity to suggest additional questions for consideration in the proceeding and allowed them to make a full presentation of fact and argument in support of their positions. *Specialized Common Carrier Services*, 24 FCC 2d 318 (1970). Despite that opportunity, neither NARUC nor any of the nearly 200 parties that participated in the proceeding made the slightest suggestion that there were any environmental implications in the proposed policies the Commission was considering.

NARUC raised environmental questions for the first time on appeal to the Ninth Circuit. Until that time, no one had ever raised environmental questions with respect to the grant of authority to construct any of the thousands of microwave towers that were then being operated by AT&T, by other established common carriers, by numerous licenseees in the FCC's Safety and Special Services, or by Community Antenna Relay Station operators licensed pursuant to Part 74 of the Commission's Rules (47 CFR Part 74).

The Ninth Circuit concluded that the circumstances of this case necessitated that a "balance should be struck against possible review and reversal of this Commission order on the ground NARUC seeks to raise for the first time in this court" (Pet. App. 40a-41a). The court was careful to point out that it did "not mean to imply that an environmental impact statement would have been required had the issue been raised before the Commission."

The court concluded that any "damage that might be done to NEPA interests by failure to review the NEPA questions now is problematic and, in any event, slight" (Pet. App. 41a). The court also pointed out that there was "no apparent obstacle to NARUC presenting its position on the environmental issue to the Commission in a proceeding on one or more of the individual applications" (*id.*). But NARUC never chose to raise an environmental objection to any specific microwave facility proposed by a specialized carrier—or for that matter by any other microwave applicant in the categories listed above. Clearly, it could have sought a hearing on environmental impact in connection with any application. The briefs filed with the Court of Appeals by the FCC and by MCI pointed out that such an opportunity was available to NARUC. The FCC reviewed each such application and did not find a need to designate formal hearings on any of them with respect to environmental questions.

After issuance of its *Specialized Carrier* decision, the FCC developed and issued rules on the handling of environmental questions in connection with its activities generally. *Implementation of the National Environmental Policy Act of 1969*, 49 FCC 2d 1313 (1974). NARUC has neither petitioned for reconsideration nor sought judicial review of this comprehensive environmental rule making.

The court below made the statement, which is quoted at page 24 of NARUC's instant petition, in the context of suggesting that NARUC had a better alternative, in seeking to

assert its alleged environmental concerns. Instead of appealing the *Specialized Carrier* rulemaking decision, NARUC should have sought a hearing on the environmental issue in connection with one or more of the individual facility applications. It is true that the FCC did not hold evidentiary hearings on the individual applications. But it reviewed these applications and passed upon them in a careful manner that met all the requirements of law, thus providing an administrative hearing process that could have effectively accommodated NARUC's environmental concerns. NARUC could, indeed, have secured *evidentiary* hearings on individual applications if it had met the requirements of Section 309 of the Communications Act (47 U.S.C. §309) by showing that "a substantial and material issue of fact is presented" as to environmental questions. It did not even try to do so, which must raise a question as to the sincerity of its concern for the environment–except as a basis for attacking the Commission's policy favoring new competition. As the court's discussion (Pet. App. 29a-35a) makes clear, there is a substantial difference between the "hearing" that the law requires in many situations and an "evidentiary hearing" which may be required in other cases. The court's subsequent reference to separate hearings on each application (Pet. App. 41a) did not mean that an *evidentiary* hearing was required in each case, but only that the Commission had to pass separately on the merits of each application with respect to matters not already covered by the hearing in the *Specialized Carrier* proceeding–including any environmental issues that might have been raised by NARUC or others.

Any consideration of the applicability of the National Environmental Policy Act of 1969 to the communications industry which considered the environmental implications of just one limited subgroup of applicants would have been irrational. Specialized carriers account for only a small percentage of the microwave towers used for communications purposes–and microwave towers represent just a fraction of all the radiation emitting towers authorized by the FCC.

Instead, the Commission systematically developed procedures for the consideration of possible environmental questions with respect to *all* its licensees. Since there had been almost no history of expressions of environmental concern with respect to communications facilities, the Commission's task was a complex, but not really an urgent, one. The Commission adopted a Report and Order on September 26, 1974 which provides for uniform treatment of any environmental questions that may develop with respect to any of the numerous kinds of licensees with whom the Commission deals. *Implementation of the National Environmental Policy Act of 1969*, 49 FCC 2d 1313 (1974).

In its petition, NARUC seizes upon the Commission's use of the term "major actions" in connection with certain microwave towers to construct the inference that the facilities of the specialized carriers are, by definition, now recognized as having a significant environmental impact. In Section 1.1305 of its Rules, 47 CFR §1.1305, the Commission uses the term "major actions" to encompass the construction of a variety of communications facilities. These are the facilities for which the Commission, in 47 CFR §1.1311, requires the submission of environmental information. Any proposed construction that is not classified as "major" does not even require the submission of environmental data. *See* 49 FCC 2d at 1319. The categorization of microwave towers of a certain height as "major" facilities thus represents simply the definition of a threshold for environmental consideration. It will be noted that all microwave towers are treated alike, regardless of whether they happen to be used by the Bell System or by specialized carriers or by anyone else. The decision as to whether environmental statements are to be required in rule making is left to a case-by-case determination. As the FCC stated in its environmental Report and Order, "communications is a clean industry." 49 FCC 2d at 1327. The Commission has nevertheless taken care to implement the requirements of NEPA in the communications industry–though it admittedly did not do so until after its

Specialized Carrier decision.

Clearly, NARUC had ample opportunity to raise any environmental considerations it thought relevant, either during its two rounds of comments in the *Specialized Carrier* proceeding, or in its oral argument before the Commission, or in its petition for reconsideration of the *Specialized Carrier* decision, or in either formal petitions or informal comments with respect to individual specialized carrier facility applications.

In this proceeding, NARUC has attempted to misuse NEPA, trying to twist it to serve as a hunting license against agency action that has met its displeasure for reasons having nothing whatsoever to do with the environment. The basic lack of genuine interest in the environment is underlined by the fact that, while NARUC made no environmental objections with respect to any individual facilities, it is now attempting to reopen this proceeding even though the facilities that ultimately resulted from the Commission's action have already been constructed and are providing service to the public without any environmental problems.

No good purpose would be served by granting the writ sought by NARUC.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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